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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

09 CR 581 (WHP)

5 DAVID K. PARSE,

6 Defendant.

7 -----x  
8 New York, N.Y.  
9 October 12, 2012  
3:00 p.m.

10 Before:

11 HON. WILLIAM H. PAULEY III,

12 District Judge

13  
14 APPEARANCES

15 PREET BHARARA  
16 United States Attorney for the  
17 Southern District of New York  
STANLEY J. OKULA  
NANETTE DAVIS  
Assistant United States Attorneys

18 ZUCKERMAN SPAEDER  
19 Attorneys for Defendant  
20 PAUL SHECHTMAN  
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(In open court)

THE DEPUTY CLERK: Case of United States of America v. David Parse. Appearances for the government?

MS. DAVIS: Good afternoon, your Honor. Nanette Davis and Stanley J. Okula, Jr. for the government.

THE COURT: Good afternoon, Ms. Davis.

MR. SHECHTMAN: Paul Shechtman for Mr. Parse. Ali Feingold who is a paralegal who has worked on this matter is with me, and obviously Mr. Parse is here.

THE COURT: Good afternoon, Mr. Shechtman. And I note the presence of Mr. Parse at counsel table.

This is oral argument on the defendant Parse's motion for a new trial. Do you wish to be heard, Mr. Shechtman?

MR. SHECHTMAN: I do, your Honor. As your Honor now knows and from the papers, there is only one issue here which is a question of ineffective assistance of counsel.

THE COURT: If you can just pull the mike a little closer. It has been a long week.

MR. SHECHTMAN: I understand. I think for all of us. Justice O'Connor once said that Strickland was the most cited case that she ever wrote, and I say that because I assume the Court is quite familiar with it and the legal standard. And obviously the standard is two part.

I would like to think though, I may be proven wrong, that if we get to prejudice, we should prevail. But we can

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1 have that discussion.

2 The first question obviously is was the performance  
3 deficient here. And that I think turns on the question of did  
4 the Brune firm make a strategic judgment on that fateful  
5 May 12, 2011 day, maybe even earlier during the voir dire  
6 itself. And I'm not sure there is a great definition of  
7 strategic judgment, but there is very good language in Justice  
8 Stevens' dissent, but I don't think the majority disagreed with  
9 it, that talks about a conscious choice between two  
10 alternatives borne of deliberation not happenstance,  
11 inattention or neglect.

12 The Second Circuit has told us that it is not a  
13 strategic judgment when what is going on is oversight or  
14 carelessness or ineptitude.

15 I like to think about this as strategic judgments are  
16 situations where lawyers say, one of two courses could have  
17 answered my client's interests. I choose A after some thought.  
18 It may be that B is the wiser course. But we'd retry a lot of  
19 cases if we second guess lawyers in that situation and  
20 obviously the Supreme Court says we shouldn't.

21 I say in our papers that if what went on here was one  
22 of two things. If the Brune firm in that plaza conversation  
23 said the equivalent of let's sandbag the Court, let's go  
24 forward. We know this information and we get a free bite at  
25 the apple. It's hard to think that's not a strategic decision,

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1 and that of course is very similar to the Chappee case in the  
2 First Circuit. Justice Stevens talks about it being a  
3 legitimate decision, but even an unethical one like sandbagging  
4 I think is going to turn out to bind the client.

5 The other way this could be a strategic decision, if  
6 what they said to themselves, let's sandbag, but more, look,  
7 she is a pro-defense juror given what we know about this  
8 checkered history, let's keep her on because we're likely to  
9 get an acquittal now. That's the government's view here.  
10 That's what they've advanced in their papers. And I think  
11 that's not at all what happened in this case.

12 I think the testimony, and the Court referred to the  
13 testimony and said the facts were largely undisputed. That  
14 doesn't mean the inferences from them were ones that all sides  
15 were ready to adopt. But I don't think the core facts were  
16 much in dispute at the hearing. And what happened here,  
17 particularly on that day of May the 12th, is that Ms. I will  
18 say Theresa because I have trouble with her last name, I  
19 apologize, had real second thoughts when she thought about that  
20 juror note and the legal words in it. She then sent paralegals  
21 to work -- as your Honor knows, the one thing about the Brune  
22 firm is they had an army of them. And she got information  
23 back, and her e-mail said something like, Jesus, I think it's  
24 her. And whether that is characterized as fleeting or a belief  
25 held longer than that, there is no doubt that she thought it.

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1           What's always been odd to me is when she gets to the  
2 plaza, how quickly she abandons it. And whether it is because  
3 she's exhausted at the end of a long trial, whether it's  
4 because, as she said, she looked more at this report and she  
5 thought it was more complicated, whether it was because her  
6 seniors cowed her. But, as your Honor says, the discussion  
7 there was superficial and never addressed the information that  
8 she had accumulated over the last 12 hours. And she simply  
9 goes along. And she goes along with her two seniors who don't  
10 know of the Westlaw report, but say to themselves it can't be  
11 her. There is no need to tell the judge. Let's go home, it's  
12 been a long day, a long trial.

13           Now, we differed back at the time as to whether that  
14 was a waiver or not. But there is no doubt that that is not a  
15 judgment that a lawyer should have made in that situation.  
16 Your Honor referred to it as a tragic misjudgment, and it was.

17           One of two things should have happened. There should  
18 have been an investigation, or there should have been someone  
19 saying, why me investigate? Let's just tell the Court and  
20 we'll go from there. And neither of those things happened.  
21 Instead, people went home, they spoke to their colleagues a day  
22 or two later, and said, geez, she has the same name, but it  
23 can't be her. And nobody said, well, let's do the easy thing  
24 and let's tell the Court. As your Honor says, a few days  
25 later, we substituted a new juror and nobody thinks to

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1 themselves we could just tell the judge.

2 Strickland talks about counsel has a duty to make  
3 reasonable investigations or make a reasonable decision that  
4 makes particular investigation unnecessary. And if ever there  
5 was a reason either to investigate more, to unleash the  
6 Nardello firm, or, I say this respectfully, unleash the Court.  
7 Because as crazy as this woman was, I've always thought if your  
8 Honor brought her out and said are you the same person, I'm not  
9 sure her lying would have gone that far. You may disagree with  
10 me on that, but I think she would have had trouble there.

11 But nobody does it. And nobody does it not because  
12 they were playing a strategic game that they were out to  
13 sandbag a court or they were out to get an acquittal. They  
14 didn't do it because, to use the Second Circuit's word, it was  
15 an oversight, it was careless, it was inept. And if I'm right  
16 about that, then I think one has met the first prong here, and  
17 then the question becomes prejudice.

18 And I can talk more, your Honor, the government  
19 doesn't argue sandbagging. I can talk more about why I think  
20 this wasn't -- look, I've read the Court's opinion, I think  
21 only seven times. And I know that the Court at the end of it  
22 talks about gambling. But, I don't think the Court is making  
23 findings in that opinion that there was a great strategy going  
24 on in that court. I think your Honor's findings are that these  
25 people really dropped the ball, and they failed to do what they

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1 should have done as lawyers. And then after that, I've always  
2 thought, partly because they dropped the ball, they were less  
3 than candid in what they said to the Court going forward.

4 THE COURT: That last point is really another part of  
5 the analysis, isn't it, that, why shouldn't this Court view  
6 Brune & Richard's lack of candor with the Court in making their  
7 motion as circumstantial evidence that they were in fact trying  
8 to conceal from the Court a strategic decision they made?

9 MR. SHECHTMAN: Look, I think, and the Court does in  
10 its opinion consider it as circumstantial evidence and it's not  
11 a pretty picture. But the question to me has always been what  
12 is it circumstantial evidence of? And I think it is  
13 circumstantial evidence of a realization that they had a  
14 responsibility to tell the Court, and they walked away that  
15 night and really left the Court in an untenable position such  
16 that at least two, and I hope three, defendants may be on trial  
17 again in the spring.

18 So, I don't have any doubt that you can take that  
19 conduct and look back. The question is, do you look back and  
20 say to yourself, these are people who knew they dropped the  
21 ball and were careless and inattentive and didn't fulfill their  
22 obligations to the Court? Or do you go back and say these are  
23 people who made a strategic decision to game the system at an  
24 earlier time. I don't think there is any evidence to support  
25 that. As I've said before, there is nothing in that plaza

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1 conversation --

2 THE COURT: I'm really thinking about beyond the plaza  
3 conversation, at the time a month and a half later when they  
4 filed their motion, they failed to disclose to the Court what  
5 they knew and when they knew it. And a series of proceedings  
6 then occur, essentially initiated by both the Court and the  
7 government to find out what they knew and when they knew it.  
8 And their statements in their memorandum to the Court on their  
9 motion that they knew were wrong or misleading at the time that  
10 they made them to me.

11 MR. SHECHTMAN: You're not going to get much argument  
12 from me on the point. The Court has a sort of lovely phrase in  
13 the opinion about disclosure by iteration or something like  
14 that. There is no doubt when you go from the telephone  
15 conversation to the document itself, and then to and not  
16 wanting further discovery, wanting your Honor to somehow  
17 address a preliminary issue and issues of privilege. Your  
18 Honor knows I got in this case late and the first thing I did  
19 was to say, what are we kidding ourselves? We are going to turn  
20 over those documents to the Court because worse comes to worst,  
21 the Court is going to look at them in camera. And if it is  
22 going to look at them in camera, it is going to look at them, I  
23 don't know you can say out of camera, but it's going to look at  
24 them. This is not a game.

25 I think what happened, though, is lawyers said to



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1 themselves we failed the Court. I have said to myself a  
2 hundred times, it is so easy the next morning or even that  
3 afternoon to walk back in and say to the judge, Judge, we  
4 think -- we don't really believe this, for a variety of  
5 reasons, but you should know the following. That she has the  
6 same name, there is other information here, and whatever your  
7 Honor wants to do with it, we don't think it's her, but we  
8 would be foolish if we didn't bring this to your attention.

9 I think what happened to the Brune firm was after this  
10 revelation, they said to themselves oh God, we really did drop  
11 the ball. But dropping the ball is ineffectiveness. Dropping  
12 the ball to me is not strategy.

13 Look, if your Honor looks at that conduct, and I know,  
14 and I say this respectfully, I know how much that conduct eats  
15 at the Court because it's wrong, and the result of it is a very  
16 long trial in this courtroom has to be done again. But, I also  
17 don't think that one looks at it and says ah-ha, there was a  
18 strategy going on.

19 I think the lawyers thought to themselves that the  
20 Court is going to be very disappointed in us if it realizes  
21 that we didn't come forward. Right. If it realizes we took  
22 for an answer it can't be her, when investigation or telling  
23 the Court was the better course.

24 If the Court concludes that that conduct is so  
25 egregious that circumstantially it proves strategy, I'm not

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1 going to win. We're going to have a sentencing in January and  
2 not a trial in the spring. But I don't think you can read that  
3 much into it, and I don't think that in fairness to Mr. Parse  
4 the record supports that. But I understand your Honor's views  
5 of the matter. I can't say more.

6 THE COURT: Other than the alleged deficiencies by the  
7 Brune firm regarding Juror No. 1, was Parse's counsel otherwise  
8 constitutionally effective?

9 MR. SHECHTMAN: Look, I've never read a trial record  
10 where I didn't say I wish they would have preserved that issue,  
11 I wish they would have made that argument, I think that  
12 cross-examination could have been stronger. I came away from  
13 that trial thinking, boy, that Barry Berke is a great  
14 cross-examiner.

15 If you asked me was it constitutionally adequate, you  
16 bet. It was very solid defense by a group of very good  
17 lawyers. So, that one's easy for me.

18 THE COURT: Can you think of any circumstance where a  
19 Court could find both a waiver to an impartial jury and  
20 effective assistance of counsel?

21 MR. SHECHTMAN: Yes. I think. The simplest one is if  
22 it really was a strategic decision, take the most blatant case,  
23 the lawyer said to themselves free bite at the apple, don't  
24 tell the judge. If we get an acquittal the great thing about  
25 the double jeopardy clause is it's over. That is a waiver

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1 under any definition.

2 It's also under Chappee in the First Circuit, and I  
3 would bet it is also effective assistance. Or it's not  
4 ineffective assistance, even though one can say that's back  
5 alley -- I can't remember the words in Chappee, but they are  
6 not very flattering. Even though you can say those things,  
7 it's got to be effective assistance because you're not going to  
8 let people get away with that game. There is a perfect  
9 example.

10 You can have, I've done this as a grid, and you can  
11 have, if you put waiver and ineffective assistance, you can  
12 fill out most of the four boxes. There is a case in the Second  
13 Circuit that I stumbled across which is Flores. It is old  
14 enough there is a Judge Van Graafeiland dissent. Flores is one  
15 where there is a waiver. The trial lawyer I think says after  
16 trial, look, I've come across this 3500 material, this Rosario  
17 material, but it wouldn't have helped me very much. And he  
18 says it at a time when it is per se reversible not to have  
19 turned over that 3500 material. There is no harmless error  
20 standard, that's how crazy New York law was. And the First  
21 Department in New York Court of Appeals says waiver. You say  
22 right on the record you're not pressing the issue. The Second  
23 Circuit said ineffective assistance, right. How can a lawyer  
24 possibly having been handed a piece of paper which is a new  
25 trial card, how can you not play it. So there is a situation

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1 where you can have waiver, but ineffective assistance. And I  
2 think it is that that Judge Easterbrook had in mind when he  
3 said you have to think about each of these doctrines separately  
4 and you can probably have every combination of them.

5 THE COURT: All right.

6 MR. SHECHTMAN: Look, on the prejudice prong, I would  
7 just say this. There were acquittals on all but two of these  
8 counts. Mr. Parse is not situated that much differently than  
9 Mr. Brubaker, and the proof as it came in didn't come in much  
10 differently. There is a sort of lovely irony here that the  
11 government cooperator who the Jenkins lawyer dealt with him was  
12 actually a witness, and so, the Kramer Levin firm got to  
13 cross-examine him. And in a sense having him as a cooperator  
14 was helpful to their side because they established that their  
15 client, like the taxpayers and everyone else, was told  
16 repeatedly this is lawful. What distinguishes these two men is  
17 the, quote, backdate.

18 And what I've tried to say in my papers is I think the  
19 government was very good at trial in turning this into a  
20 backdating case. I don't think that's what the Deutsche Bank  
21 records show. They are doing these in February and March and  
22 putting them on February and March statements and they're  
23 putting "as of." They're then going out to what are very  
24 accomplished tax preparers who were getting February, March  
25 statements. And know there was a mistake and are then filing

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1 tax returns.

2 At the end of the day, the government's brief takes  
3 you at great pains through each of those three backdating  
4 transactions. And I should say, quote, backdating  
5 transactions. What you learn is what is undisputed is that's  
6 what happened. Mistakes in the craziness of this law firm  
7 where you were churning these things out every December and  
8 taking a portion of the losses into income, the tax loss, in  
9 the craziness of that and mistakes were made. And trades were  
10 done to try to correct the mistakes. You can't dispute that.

11 The only question at the end of the day, as I say in  
12 the papers, is mens rea. And the mens rea when you read the  
13 government's evidence, the bottom line is he must have known.  
14 And he must have known because he was an accountant.

15 And what we know on that is I think for two years, in  
16 the '80s, he was a junior accountant at 20 some thousand  
17 dollars a year. There is not a shred of evidence that he ever  
18 took a class that taught, quote, the annual accounting rule,  
19 and I think the Court knows the Second Circuit precedent that  
20 says "must have known" is an argument, but it's not of great  
21 weight.

22 And I'll stop with this. I have to say, I wasn't in  
23 the must've known category. This wasn't something that I was  
24 taught in tax law. Maybe I forgot it and maybe the answer is  
25 it's so obvious you didn't have to teach it. But I said to

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1 myself the other night, if somebody had said to me, and again I  
2 apologize for the example, I won't try to belabor it. But  
3 December 28 in year one if I gave 10,000 shares of IBM to a  
4 charity and 10,000 shares to my daughter, right, and I said to  
5 my broker just move them into those -- 10,000 to charity,  
6 10,000 to my daughter. And the broker made a mistake. And  
7 here's what makes it so tricky. The shares to the charity were  
8 IBM; the shares to my daughter were Philip Morris. They  
9 reversed it. The charity calls January 2nd and says we can't  
10 take tobacco stock. We can't accept your gift. I call the  
11 broker, I say what about this. He says we'll just reverse it.  
12 It was our mistake. We'll send the Philip Morris to your  
13 daughter and we'll send the IBM to the charity. And they  
14 reverse it and they put as of December 28 because they reverse  
15 it and do it at December 28 prices and it all shows up on the  
16 January statement.

17 If I said to Mr. Parse, if I said to me -- the Court  
18 may be situated differently, the Court's been educated by this  
19 trial. If I said can I put that tax deduction on my year one  
20 return, in that situation, even though it was mistake, it never  
21 got accepted, I'd say I don't know, you should ask a tax  
22 lawyer. And that's what Mr. Parse said. He made the  
23 transactions, he made the change, not a single document at  
24 Deutsche Bank reflected that this happened other than the as of  
25 which was a reflection of what the pricing was.

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1 I'm sitting here with a tolling agreement from the  
2 Southern District in a case of mine which says as of  
3 January 14. Which is faxed on January 16. But everybody  
4 wanted it to be effective two days before because that was the  
5 agreement, as happens in the Southern District. It happens  
6 everywhere. And it doesn't mean backdating. In this case it  
7 means this is the price.

8 But all that is a long way of saying there is no proof  
9 that he knew this rule. There is no proof it was discussed  
10 with him. There is no proof he thought he knew these  
11 transactions were wrong. And at the end of the day, when one's  
12 argument is he must've known, that's a weak reed, particularly  
13 when this prejudice notion is harmless error like. After all,  
14 you have Justice Marshall's dissent in Strickland that says it  
15 should have been harmless error, it should have been under the  
16 government's burden. When you do harmless error analysis, you  
17 say two things: What is the nature of the error, and what's  
18 the proof. The nature of the error here is that a government  
19 partisan out to get him in particular was on the jury. That's  
20 a pretty serious error. The proof, far from overwhelming.

21 As I say, I think if I can get you to the prejudice  
22 prong, we ought to see you in April and not in January and I  
23 hope that's the case.

24 THE COURT: Thank you, Mr. Shechtman.

25 Ms. Davis, does the government want to be heard?

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1 MS. DAVIS: Yes, please, your Honor.

2 Good afternoon, your Honor. I'm glad to see that  
3 Mr. Shechtman has conceded that other than this particular  
4 area, Mr. Parse did in fact receive what can only be described  
5 as a platinum plated defense with a defense team that most  
6 defendants can only dream of.

7 MR. SHECHTMAN: I don't think I quite went that far,  
8 your Honor.

9 MS. DAVIS: I do think, though, that had Mr. Shechtman  
10 been here at trial and seen the forces that were mustered in  
11 Mr. Parse's favor, he would have to admit that it is a rare  
12 scene in such a courtroom for an individual defendant.

13 Your Honor, the crux of it is that defendant Parse is  
14 seeking to be rewarded now for the strategic choices of his  
15 attorney regarding Catherine Conrad and their knowledge of her.  
16 Choices for which he has already benefited in the form of  
17 acquittals on the conspiracy and the tax evasion counts. We  
18 submit, as we said in our papers, that we believe that  
19 Mr. Shechtman has met neither prong of the Strickland standard  
20 in that he cannot show ineffective assistance of counsel and he  
21 cannot show prejudice.

22 This Court in its ruling on the motion for new trial  
23 regarding Catherine Conrad has already found that the Brune &  
24 Richard law firm knew that Catherine Conrad and Juror No. 1  
25 were the same person and chose to gamble with the jury that



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1 they had. Your Honor, that in our view ends the inquiry  
2 completely. That finding alone is sufficient to defeat a  
3 finding of ineffective assistance of counsel.

4 The Second Circuit has made very clear, as have other  
5 circuits, that you cannot as a defense counsel basically engage  
6 in a heads-we-win-tails-you-lose strategy when it comes to your  
7 trial conduct. We know that based on the documentary evidence  
8 and the evidence that was adduced at the hearing as well as the  
9 evidence that was put forth in the affidavit of Susan Brune,  
10 that the Brune & Richard law firm had the suspension opinion  
11 prior to voir dire, and chose not bring it to this Court's  
12 attention. As we all know engaged in subsequent investigation  
13 regarding Juror No. 1, when Theresa Trzskoma started to have  
14 certain doubts about her after the receipt of Juror No. 1's  
15 note.

16 It's quite clear that this is not a case where the  
17 defense counsel had been given a piece of information and did  
18 nothing. That's quite, quite not what happened here. In fact,  
19 we know that prior to voir dire, they discussed the suspension  
20 opinion, they chose not to bring it to the Court's attention.  
21 Instead relying simply on the voir dire answers, even though as  
22 this Court pointed out, far more trivial issues were aired by  
23 all of the parties, by the government and indeed by the Court,  
24 in terms of trying to figure out who would be good jurors.  
25 They chose not to bring that to the Court's attention then

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1 which I think is very significant. And it is significant in  
2 part because I think if we can say anything, that we all know  
3 based on the Brune & Richard's defense of Mr. Parse, that if  
4 they had any actual and real concern about a suspended attorney  
5 being on this jury, if they really thought that that was not in  
6 their client's interest, you know, we all know that they would  
7 have brought it to the Court's attention during voir dire. And  
8 if not at voir dire, then after the results of the Theresa  
9 Trzskoma investigation.

10 This is absolutely a situation where the Brune &  
11 Richard lawyers, on May 12, after the investigation that they  
12 had, they looked at all the alternatives. We know because  
13 Laurie Edelstein testified at the hearing, they considered the  
14 three possible alternatives. They considered whether or not  
15 they should do more investigation, and Susan Brune said no.  
16 They considered whether or not they should bring it to the  
17 Court's attention, and they said no. So they decided to do  
18 nothing. And it is that conscious and deliberate choice that  
19 we believe means that they made a strategic choice that cannot  
20 form the basis of ineffective assistance of counsel.

21 How do we know in the government's view that this  
22 indeed was a tactical choice? As this Court just pointed out  
23 with regard to the questioning of Mr. Shechtman, they did not  
24 bring that knowledge to the attention of the Court either in  
25 the brief, where they made it appear as if they first learned

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1 of this after the receipt of the jury -- of Ms. Conrad's letter  
2 to the government in May after the verdict. And worse, even in  
3 the conference calls with the Court, they continued to make it  
4 appear and resist the Court and the government learning that  
5 knowledge.

6 Mr. Shechtman seems to want to characterize this as  
7 them wanting to hide their mistakes. But it's quite clear, and  
8 Susan Brune and Laurie Edelstein testified, we would not have  
9 told this Court but for the Court pressing. That to me speaks  
10 of a decision made early on and continuing through the briefing  
11 that they wanted the juror on the panel, but they wanted the  
12 Court not to know exactly what they knew because they  
13 understood, and, as was acknowledged at the hearing, that that  
14 was damaging to their client.

15 THE COURT: Would you address the prejudice prong.

16 MS. DAVIS: Yes, your Honor. Your Honor, we believe  
17 that there is more than adequate evidence, indeed overwhelming  
18 evidence, of defendant Parse's criminal involvement in the  
19 corrupt endeavor to obstruct the IRS and in the mail fraud  
20 count. The defense conceded in its papers that Mr. Parse was  
21 involved in the backdated transactions. We think backdated  
22 transactions is a perfectly adequate description of them.

23 We also submit, your Honor, that Mr. Parse's  
24 background as a CPA, even a non-practicing CPA, is under case  
25 law relevant to his intent and circumstantial evidence of his

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1 incident. We know he was instrumental and indeed Carrie Yackee  
2 cited to more than a dozen instances during her testimony where  
3 she made clear that she was acting at the instructions of and  
4 with the knowledge of David Parse in implementing all of these  
5 complex and varied transactions that had to be effectuated in  
6 order to change the results of the three sets of transactions.  
7 It's actually four because Coleman and Blair were two separate  
8 taxpayers. She understood that this was being done for tax  
9 purposes. This is Carrie Yackee the sales assistant. Nice  
10 woman, but not nearly as sophisticated as Mr. Parse. To  
11 suggest that the jury could not find or infer that he knew  
12 exactly why these transactions were being effectuated, not for  
13 any real investment reason, not because they had figured out  
14 that in February and March, the year after the transactions had  
15 been done, that somehow it would have been a better investment  
16 to have not invested in Cisco stock, but instead to have  
17 invested in foreign currency. To suggest that the jury could  
18 not have found that Mr. Parse knew that the reason that these  
19 were being done was to effectuate tax losses for the prior year  
20 is simply ludicrous.

21 Your Honor, the defendant was faxed information  
22 relating to the tax returns themselves. This wasn't just a  
23 one-way street between David Parse's office and Jenkins &  
24 Gilchrist, but it was at least a two-way street between  
25 Deutsche Bank and Jenkins & Gilchrist and also the accountants.

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1 So it's quite clear the jury was entitled to infer that he knew  
2 that this was being done to change the results of the tax  
3 losses. He also knew, and there is more than a plethora of  
4 evidence on this, that each of these tax shelter transactions  
5 had to be completed by year end. And that's why, as Mr. Bair  
6 testified and others testified, it was a real effort.

7 Sandra Burnside, you might recall, Mr. Daugerdas'  
8 secretary, testified about the avalanche of work that went on  
9 in December at the end of the tax years in order to finalize  
10 these transactions. Well, that avalanche of work hit the  
11 offices of Mr. Parse's desk. And as Carrie Yackee testified,  
12 Carrie Yackee's desk as well.

13 So to suggest that he was not aware this was being  
14 done in order to defraud the IRS as the true results of the  
15 transaction we submit is unsupportable.

16 There was a suggestion in Mr. Shechtman's brief, I  
17 don't think he touched on it today, but the suggestion was that  
18 these transactions, these as of transactions were approved by  
19 Deutsche Bank.

20 Well, first of all, Carrie Yackee's testimony here  
21 that she was going to Mr. Parse for approval on these  
22 transactions. There is also no evidence to suggest that anyone  
23 other than Mr. Parse and Carrie Yackee at Deutsche Bank knew  
24 the full picture of what went on, which was that these  
25 transactions for these particular taxpayers were tax shelter

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1 transactions that had to be done by the end of the year, that  
2 had been done by the end of the year, pursuant to instructions  
3 that had been given by Jenkins & Gilchrist to Deutsche Bank,  
4 had been implemented properly by Mr. Parse in the first  
5 instance, and now were being requested to redo them to achieve  
6 a different result.

7 This I think is a distinction that makes  
8 Mr. Shechtman's example of the broker's mistake an apple to our  
9 orange or an orange to our apple, which is that this is not an  
10 instance where Mr. Parse takes an instruction from a client and  
11 screws it up. Implements it wrong. Rather, they did  
12 everything that they were supposed to do the way it was  
13 supposed to be done, and there are results to show for that.  
14 It's only because the tax loss that they wanted to get from  
15 these results was not correct that it required anything to be  
16 done after the end of the year.

17 We suggest that the evidence was overwhelming to  
18 support Mr. Parse's knowing and criminal involvement in both  
19 the corrupt endeavor to obstruct and impede the IRS and in mail  
20 fraud.

21 THE COURT: Anything further?

22 MS. DAVIS: Your Honor, there are other pieces of  
23 evidence which we've detailed in our briefing but which I will  
24 not go through again here.

25 I did want to just note though that the Second Circuit

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1 has stated that you can find that where there has been a split  
2 verdict, as is the case with Mr. Parse, that is evidence of a  
3 lack of prejudice. We had argued in the original motion for  
4 new trial and we renew that as well.

5 Finally, your Honor, with regard to the letter of  
6 Catherine Conrad to the government which was referenced in the  
7 defendant's briefing, she talked about their discussions and  
8 deliberations with regard to David Parse. And interestingly  
9 what she also said, which was not mentioned by Mr. Shechtman in  
10 his brief, was that that struggle ended when they asked the  
11 Court to reread the definitions of wilfully and knowingly.  
12 Different states for different counts.

13 MR. SHECHTMAN: Well, I'll wait. I apologize to the  
14 Court.

15 MS. DAVIS: And interestingly, their verdict exactly  
16 tracked that difference between wilfully, this was required in  
17 the conspiracy count and for the tax evasion counts, and  
18 knowingly which was really the mens rea relating to other ones.  
19 So you might say that they had a struggle.

20 To the extent we can even be considering that letter  
21 at all because of Rule 606(b), but I think it's quite clear  
22 that they made a deliberate and informed decision about making  
23 a distinction drawn on the evidence as apply to the law. Thank  
24 you.

25 THE COURT: Thank you, Ms. Davis.

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1 Mr. Shechtman, do you want to be heard further?

2 MR. SHECHTMAN: I will and I will try to be brief,  
3 Judge. I think really four points. The government has  
4 repeated at the argument here what it said in its brief. Which  
5 was that Mr. Parse benefited from the strategic choice that his  
6 clients made and I'll hold the strategic choice point for  
7 second. But I take that to mean that he got acquitted here  
8 because she was on the jury. And that, my father used to say  
9 arguments were nonsense on stilts, and that is nonsense on  
10 stilts. I mean, your Honor knows exactly what happened here.  
11 There was a partisan in the jury room, a woman who couldn't  
12 follow instructions and the like. Your opinion couldn't be  
13 stronger on the point. And she was fighting the good fight to  
14 convict him on 100 percent.

15 So to say we got the benefit of having her on there  
16 because we were acquitted isn't worthy, respectfully, of the  
17 government.

18 And the related point this was a split verdict, it is  
19 a split verdict because she couldn't carry the ball as far as  
20 she wanted to, but not because Mr. Parse benefited by her  
21 presence.

22 The second thing I'd say is this. I take it there are  
23 two competing visions of what happened here, and at the end of  
24 the day, your Honor is going to have to decide. One is that  
25 what happened in that court, your Honor, in the plaza, is that



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1 what was said was, look, don't be stupid, it can't be her, to  
2 do any more would be a waste of the court's time. That's what  
3 I think happened. That's what I think the record shows.

4 The other is, let's be smart. She'll be a great juror  
5 because she is a suspended lawyer. Or, let's be smart. If we  
6 leave her on, we get two bites at the apple. The latter two I  
7 think are strategic, but be careful in the following sense.  
8 The first one is a choice. It is a choice to do nothing. You  
9 cannot have a case in which there is not in a sense a choice if  
10 it's coming up in an ineffective assistance claim. I can cite  
11 you to Breakiron and Johnson v. Armontrout. In our brief  
12 lawyers are making choices. In those cases the question is are  
13 they informed choices, are they reasonable choices, are they  
14 competent choices, are they strategic choices. And if the  
15 choice is don't be stupid, it can't be her, that is not a  
16 strategic choice, that is a tragic misjudgment. Implicit in  
17 the word "misjudgment" is that someone's making a choice. But  
18 if it is a tragic misjudgment, I think it's ineffective  
19 assistance.

20 The next thing I'd say is this. We're told that there  
21 can't be any doubt that these transactions were effectuated so  
22 that there would be tax lawyers and tax losses in the prior  
23 year and it's ludicrous to think otherwise. Of course that's  
24 why the transactions were being done. There is no doubt that's  
25 why these transactions were being done in February or March.

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1 But the real question is, did Mr. Parse know that that was  
2 defrauding the government. Right.

3 Look, the avalanche of work here was in December. But  
4 the question is, if you made a mistake, like in my example, can  
5 you undo it. And you have to appreciate what the government  
6 has said to you today. It has essentially said if it is a  
7 broker's mistake, like in my hypothetical, then maybe a  
8 reasonable broker could think you could undo it. But if it is  
9 a lawyer's mistake, you can't. And that's a very different  
10 version of the annual accounting rule than I've ever heard  
11 before. Right. And if my hypothetical is one in which a  
12 reasonable broker could think leave it up to the tax lawyers, I  
13 am not sure what happened in this case isn't in that same  
14 category.

15 We ended up with an argument about the contents of the  
16 note and how your Honor should interpret them to show whether  
17 there was prejudice here. All of this began with the  
18 government saying to us be careful, Rule 606(b) has its limits.  
19 The one thing I know, and the Third Circuit case in Breakiron  
20 is quite good on talking about whether one looks at this  
21 subjectively or objectively, you can't draw inferences from  
22 that juror's note in deciding whether there was prejudice here  
23 for two reasons. One, 606(b) precludes it, and two, that note  
24 was written by Catherine Conrad and I still don't think the  
25 United States wants to be standing up in a court and saying

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1 rely on what Catherine Conrad said.

2 THE COURT: All right. Counsel, thank you for your  
3 arguments on the motion. Decision reserved. Have a good  
4 afternoon.

5 MS. DAVIS: Thank you.

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